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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Federal Trade Commission,

10 Plaintiff,

11 v.

12 James D. Noland, Jr., et al.,

13 Defendants.
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No. CV-20-00047-PHX-DWL

ORDER

15 On January 28, 2020, Defendants filed an emergency motion to take expedited
16 discovery related to Federal Trade Commission's ("FTC") pending request for a
17 preliminary injunction. (Doc. 53.) Specifically, Defendants seek an order (1) compelling
18 the FTC to make four of its witnesses available for depositions before the preliminary
19 injunction hearing, which is scheduled for February 12, 2020, and (2) compelling the FTC
20 "to provide written responses" to an undefined set of "written discovery propounded by
21 the Defendants within 5 calendar days after service of such discovery." (*Id.* at 4-5.)
22 Defendants also seek to prohibit the FTC "from presenting any evidence at the Preliminary
23 Injunction Hearing" if the FTC fails to meet these obligations. (*Id.*) The FTC opposes the
24 motion, arguing that the discovery sought by Defendants is overly broad, unnecessary, and
25 not an "emergency" because the FTC had offered to meet-and-confer on discovery matters
26 but Defendants instead opted for court intervention. (Doc. 58.) For the following reasons,
27 Defendants' motion will be granted in part and denied in part.

28 To obtain expedited discovery, a party must demonstrate good cause. *Semitool, Inc.*

1 *v. Tokyo Electron Am., Inc.*, 208 F.R.D. 273, 276 (N.D. Cal. 2002). *See also Kulkarni v.*
2 *Upasani*, 659 Fed. App'x 937, 941 (9th Cir. 2016). "Good cause may be found where the
3 need for expedited discovery, in consideration of the administration of justice, outweighs
4 the prejudice to the responding party." *Semitool*, 208 F.R.D. at 276. "In considering
5 whether good cause exists, factors courts may consider include: (1) whether a preliminary
6 injunction is pending; (2) the breadth of the discovery request; (3) the purpose for
7 requesting the expedited discovery; (4) the burden on the defendants to comply with the
8 requests; and (5) how far in advance of the typical discovery process the request was made.
9 The party seeking expedited discovery in advance of the Rule 26(f) conference has the
10 burden of showing good cause for the requested departure from usual discovery
11 procedures." *Rovio Entm't Ltd. v. Royal Plush Toys, Inc.*, 907 F. Supp. 2d 1086, 1099
12 (N.D. Cal. 2012).

13 These factors weigh against Defendants' request to depose the FTC's witnesses
14 before the preliminary injunction hearing. As an initial matter, Defendants have separately
15 filed a motion to compel live testimony at that hearing. (Doc. 56.) Although the Court
16 will not prejudge that motion until it receives and considers the FTC's response, it's likely
17 the request will be granted. If so, Defendants will be able to cross-examine the FTC's
18 witnesses during the hearing. *United States v. Gila Valley Irrigation Dist.*, 31 F.3d 1428,
19 1442 (9th Cir. 1994) ("On a motion for a preliminary injunction an adequate presentation
20 of the facts is necessary. . . . The opposing party must be afforded the opportunity to cross-
21 examine the moving party's witnesses and to present evidence.") (citation omitted).
22 Defendants have cited no authority for the proposition that they're also entitled to depose
23 those witness before the cross-examination begins. Moreover, granting Defendants'
24 request would place a substantial burden on the FTC, which would need to prepare for and
25 defend four depositions in the short time between now and February 12.

26 As for Defendants' request to obtain written discovery from the FTC in advance of
27 the hearing, that request will be granted only in part. Notably, Defendants' motion fails to
28 articulate, with any precision, the scope of the written discovery they seek—although

1 Defendants assert they are only seeking “limited expedited discovery” from the FTC (Doc.
2 53 at 4), the Court has no way to evaluate this statement because the motion is silent on
3 what is (and isn’t) being sought.

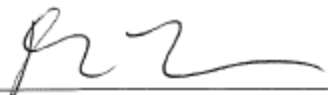
4 Additionally, the FTC is amenable to providing some written discovery before the
5 hearing. Specifically, the FTC has offered to provide “all documents that the FTC received
6 in response to subpoenas issued during its investigation,” which “contain all of the
7 nonpublic information relied upon by [the FTC’s] forensic accountant,” as well as “all of
8 the audio and video recordings . . . obtained during its investigation,” “any transcripts of
9 those recordings created at the FTC’s request,” and “all materials referenced in [the FTC’s
10 expert witness’s] reliance materials.” (Doc. 58 at 8-9.) The FTC also proposes a timeline
11 for delivering those materials, indicating they could all be delivered by February 7, 2020.
12 These suggestions strike the Court as reasonable, particularly in light of the absence of any
13 concrete counter-proposal by Defendants, so the Court will adopt them. Production of
14 these materials will enable Defendants to effectively cross-examine any FTC witnesses
15 called at the preliminary injunction hearing, which both fulfills Defendants’ rights and
16 further obviates the need to depose the FTC’s witnesses before the hearing.

17 Finally, Defendants request that “if the FTC fails to comply with the requirements
18 of [this order], the FTC shall be precluded from presenting any evidence at the Preliminary
19 Injunction Hearing.” (Doc. 53 at 5.) The Court declines to prejudge any discovery
20 violation. Should a problem occur, the Court will address it as needed.

21 Accordingly, **IT IS ORDERED** that Defendants’ emergency motion for leave to
22 take limited expedited discovery (Doc. 53) is **granted in part and denied in part**, as
23 discussed above.

24 Dated this 30th day of January, 2020.

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Dominic W. Lanza
United States District Judge